

S.184

Introduced by Senators Sears, Ashe, and Benning

Referred to Committee on Judiciary

Date: January 7, 2014

Subject: Crimes; innocence protection; eyewitness identification

Statement of purpose of bill as introduced: This bill proposes to require all law enforcement agencies to adopt a model eyewitness identification policy.

*An act relating to law enforcement policies on eyewitness identification and bias-free policing and on recording of custodial interrogations in homicide and sexual assault cases*

~~An act relating to eyewitness identification policy~~

It is hereby enacted by the General Assembly of the State of Vermont:

~~Sec. 1. 13 V.S.A. chapter 182, subchapter 3 of is added to read:~~

Subchapter 3. Law Enforcement Practices

§ 5581. EYEWITNESS IDENTIFICATION POLICY

(a) On or before January 1, 2015, each State, county, and municipal law enforcement agency that employs one or more certified law enforcement officers shall adopt an eyewitness identification policy.

(b) The written policy shall contain, at a minimum, the following essential elements of the model policy issued by the Law Enforcement Advisory Board:

(1) Protocols guiding the use of a show-up identification procedure.

(2) The photo or live lineup shall be conducted by a blind administrator

~~who does not know the suspect's identity. For law enforcement agencies with~~

1 ~~limited staff, this can be accomplished through a procedure in which~~  
2 photographs are placed in folders, randomly numbered, and shuffled, and then  
3 presented to an eyewitness such that the administrator cannot see or track  
4 which photograph is being presented to the witness until after the procedure is  
5 completed.

6 (3) Instructions to the eyewitness, including that the perpetrator may or  
7 may not be among the persons in the identification procedure.

8 (4) In a photo or live lineup, fillers shall possess the following  
9 characteristics:

10 (A) All fillers selected shall resemble the eyewitness's description of  
11 the perpetrator in significant features such as face, weight, build, or skin tone,  
12 including any unique or unusual features such as a scar or tattoo.

13 (B) At least five fillers shall be included in a photo lineup, in addition  
14 to the suspect.

15 (C) At least four fillers shall be included in a live lineup, in addition  
16 to the suspect.

17 (5) If the eyewitness makes an identification, the administrator shall  
18 seek and document a clear statement from the eyewitness, at the time of the  
19 identification and in the eyewitness's own words, as to the eyewitness's  
20 confidence level that the person identified in a given identification procedure is  
21 the perpetrator.

1 ~~(e) The model policy issued by the Law Enforcement Advisory Board shall~~  
2 encourage ongoing law enforcement training in eyewitness identification  
3 procedures for State, county, and municipal law enforcement agencies.

4 Sec. 2. REPORTING EYEWITNESS IDENTIFICATION POLICIES

5 (a) The Department of Public Safety shall report to the General Assembly  
6 on or before February 15, 2015, regarding its compliance with Sec. 1 of this  
7 act. The report shall include a copy of the policy and any issues hindering  
8 adoption or implementation of the policy.

9 (b) The Vermont Association of Police Chiefs and the Vermont Sheriffs'  
10 Association shall individually report to the General Assembly on or before  
11 February 15, 2015, regarding its members' compliance with Sec. 1 of this act.  
12 The report shall include the following:

13 (1) each law enforcement agency that is and is not in compliance with  
14 Sec. 1 of this act;

15 (2) copies of the various policies adopted pursuant to this act that reflect  
16 substantive differences from agency to agency; and

17 (3) any issues hindering adoption or implementation of the policies.

18 Sec. 3. EFFECTIVE DATE

19 ~~This act shall take effect on passage.~~

~~Sec. 1. 13 V.S.A. chapter 182, subchapter 3 is added to read:~~

~~Subchapter 3. Law Enforcement Practices~~

~~§ 5581. EYEWITNESS IDENTIFICATION POLICY~~

~~(a) On or before January 1, 2015, every State, county, and municipal law enforcement agency and every constable who exercises law enforcement authority pursuant to 24 V.S.A. § 1936a and who is trained in compliance with 20 V.S.A. § 2358 shall adopt an eyewitness identification policy.~~

~~(b) The written policy shall contain, at a minimum, the following essential elements as identified by the Law Enforcement Advisory Board:~~

~~(1) Protocols guiding the use of a show-up identification procedure.~~

~~(2) The photo or live lineup shall be conducted by a blind administrator who does not know the suspect's identity. For law enforcement agencies with limited staff, this can be accomplished through a procedure in which photographs are placed in folders, randomly numbered and shuffled, and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.~~

~~(3) Instructions to the eyewitness, including that the perpetrator may or may not be among the persons in the identification procedure.~~

~~(4) In a photo or live lineup, fillers shall possess the following characteristics:~~

~~(A) All fillers selected shall resemble the eyewitness's description of the perpetrator in significant features such as face, weight, build, or skin tone, including any unique or unusual features such as a scar or tattoo.~~

~~(B) At least five fillers shall be included in a photo lineup, in addition to the suspect.~~

~~(C) At least four fillers shall be included in a live lineup, in addition to the suspect.~~

~~(5) If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator.~~

~~(c) The model policy issued by the Law Enforcement Advisory Board shall encourage ongoing law enforcement training in eyewitness identification procedures for State, county, and municipal law enforcement agencies and constables who exercise law enforcement authority pursuant to 24 V.S.A. § 1936a and are trained in compliance with 20 V.S.A. § 2358.~~

~~(d) If a law enforcement agency does not adopt a policy by January 1, 2015 in accordance with this section, the model policy issued by the Law~~

~~Enforcement Advisory Board shall become the policy of that law enforcement agency or constable.~~

~~Sec. 2. REPORTING EYEWITNESS IDENTIFICATION POLICIES~~

~~The Vermont Criminal Justice Training Council shall report to the General Assembly on or before April 15, 2015, regarding law enforcement's compliance with Sec. 1 of this act.~~

~~Sec. 3. EFFECTIVE DATE~~

~~This act shall take effect on passage.~~

Sec. 1. 13 V.S.A. chapter 182, subchapter 3 is added to read:

Subchapter 3. Law Enforcement Practices

§ 5581. EYEWITNESS IDENTIFICATION POLICY

(a) On or before January 1, 2015, every State, county, and municipal law enforcement agency and every constable who exercises law enforcement authority pursuant to 24 V.S.A. § 1936a and who is trained in compliance with 20 V.S.A. § 2358 shall adopt an eyewitness identification policy.

(b) The written policy shall contain, at a minimum, the following essential elements as identified by the Law Enforcement Advisory Board:

(1) Protocols guiding the use of a show-up identification procedure.

(2) The photo or live lineup shall be conducted by a blind administrator who does not know the suspect's identity. For law enforcement agencies with limited staff, this can be accomplished through a procedure in which photographs are placed in folders, randomly numbered and shuffled, and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

(3) Instructions to the eyewitness, including that the perpetrator may or may not be among the persons in the identification procedure.

(4) In a photo or live lineup, fillers shall possess the following characteristics:

(A) All fillers selected shall resemble the eyewitness's description of the perpetrator in significant features such as face, weight, build, or skin tone, including any unique or unusual features such as a scar or tattoo.

(B) At least five fillers shall be included in a photo lineup, in addition to the suspect.

(C) At least four fillers shall be included in a live lineup, in addition to the suspect.

(5) If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator.

(c) The model policy issued by the Law Enforcement Advisory Board shall encourage ongoing law enforcement training in eyewitness identification procedures for State, county, and municipal law enforcement agencies and constables who exercise law enforcement authority pursuant to 24 V.S.A. § 1936a and are trained in compliance with 20 V.S.A. § 2358.

(d) If a law enforcement agency does not adopt a policy by January 1, 2015 in accordance with this section, the model policy issued by the Law Enforcement Advisory Board shall become the policy of that law enforcement agency or constable.

## **Sec. 2. REPORTING EYEWITNESS IDENTIFICATION POLICIES**

The Vermont Criminal Justice Training Council shall report to the General Assembly on or before April 15, 2015 regarding law enforcement's compliance with Sec. 1 of this act.

~~Sec. 3. 20 V.S.A. § 2366 is amended to read:~~

### **§ 2366. LAW ENFORCEMENT AGENCIES; BIAS-FREE POLICING POLICY; RACE DATA COLLECTION**

~~(a) No later than January 1, 2013 On or before September 1, 2014, every State, local, county, and municipal law enforcement agency that employs one or more certified law enforcement officers, and every law enforcement officer who exercises law enforcement authority pursuant to 24 V.S.A. § 1936a and who is trained in compliance with section 2358 of this title, shall adopt a bias-free policing policy. The policy shall contain the following essential substantially the same elements of such a policy as determined by the Law Enforcement Advisory Board after its review of either the current Vermont State Police Policy and bias-free policing policy or the most current model policy issued by the Office of the Attorney General.~~

~~(b) The policy shall encourage ongoing bias free law enforcement training for State, local, county, and municipal law enforcement agencies If a law enforcement agency or officer that is required to adopt a policy pursuant to subsection (a) of this section fails to do so on or before September 1, 2014, that agency or officer shall be deemed to have adopted, and shall follow and enforce, the model policy issued by the Office of the Attorney General.~~

~~(c) On or before September 7, 2014, and annually thereafter as part of their annual training report to the Council, every State, local, county, and~~

~~municipal law enforcement agency, and every law enforcement officer who exercises law enforcement authority pursuant to 24 V.S.A. § 1936a and who is trained in compliance with section 2358 of this title, shall report to the Council whether the agency or officer has adopted a bias-free policing policy in accordance with subsections (a) and (b) of this section and which policy has been adopted. The Criminal Justice Training Council shall determine, as part of the Council's annual certification of training requirements, if current officers have received training on bias-free policing.~~

~~(d) On or before October 15, 2014, and annually thereafter on April 1, the Criminal Justice Training Council shall report to the House and Senate Committees on Judiciary which departments and officers have adopted a bias-free policing policy, which policy has been adopted, and whether officers have received training on bias-free policing.~~

~~(e) On or before September 1, 2014, every State, local, county, and municipal law enforcement agencies that employ one or more certified law enforcement officers are encouraged to work with the Vermont Association of Chiefs of Police to extend the collection of roadside stop race data uniformly throughout state law enforcement agencies, with the goal of obtaining uniform roadside stop race data for analysis agency shall collect roadside stop data consisting of the following: the age, gender, and race of the driver; the reason for the stop; the type of search conducted, if any; the evidence located, if any; and the outcome of the stop. Law enforcement agencies shall work with the Vermont Criminal Justice Training Council with the goals of collecting uniform data, adopting uniform storage methods and periods, and ensuring that data can be analyzed. Roadside stop data, as well as reports and analysis of roadside stop data, shall be public.~~

Sec. 3. 20 V.S.A. § 2366 is amended to read:

§ 2366. LAW ENFORCEMENT AGENCIES; ~~BIAS-FREE~~ FAIR AND IMPARTIAL POLICING POLICY; RACE DATA COLLECTION

~~(a)(1) No later than January 1, 2013~~ Except as provided in subdivision (2) of this subsection, on or before September 1, 2014, every State, local, county, and municipal law enforcement agency ~~that employs one or more certified law enforcement officers, and every constable who exercises law enforcement authority pursuant to 24 V.S.A. § 1936a and who is trained in compliance with section 2358 of this title, shall adopt a bias-free~~ fair and impartial policing policy. The policy shall contain ~~the following essential~~ substantially the same elements of ~~such a policy as determined by the Law Enforcement Advisory Board after its review of either the current Vermont State Police Policy and fair and impartial policing policy or the most current model policy issued by the Office of the Attorney General.~~

(2) On or before January 1, 2016, the Criminal Justice Training Council, in consultation with stakeholders, including the Vermont League of Cities and Towns, the Vermont Human Rights Commission, and Migrant Justice, shall adopt a model fair and impartial policing policy. On or before July 1, 2016, every State, local, county, and municipal law enforcement agency, and every constable who exercises law enforcement authority pursuant to 24 V.S.A. § 1936a and who is trained in compliance with section 2358 of this title, shall adopt a fair and impartial policing policy that includes, at a minimum, the elements of the Criminal Justice Training Council policy.

(b) ~~The policy shall encourage ongoing bias free law enforcement training for State, local, county, and municipal law enforcement agencies~~ If a law enforcement agency or constable that is required to adopt a policy pursuant to subsection (a) of this section fails to do so on or before September 1, 2014, that agency or constable shall be deemed to have adopted, and shall follow and enforce, the model policy issued by the Office of the Attorney General.

(c) On or before September 15, 2014, and annually thereafter as part of their annual training report to the Council, every State, local, county, and municipal law enforcement agency, and every constable who exercises law enforcement authority pursuant to 24 V.S.A. § 1936a and who is trained in compliance with section 2358 of this title, shall report to the Council whether the agency or officer has adopted a fair and impartial policing policy in accordance with subsections (a) and (b) of this section and which policy has been adopted. The Criminal Justice Training Council shall determine, as part of the Council's annual certification of training requirements, if current officers have received training on fair and impartial policing.

(d) On or before October 15, 2014, and annually thereafter on April 1, the Criminal Justice Training Council shall report to the House and Senate Committees on Judiciary which departments and officers have adopted a fair and impartial policing policy, which policy has been adopted, and whether officers have received training on fair and impartial policing.

(e)(1) On or before September 1, 2014, every State, local, county, and municipal law enforcement agencies that employ one or more certified law enforcement officers are encouraged to work with the Vermont Association of Chiefs of Police to extend the collection of roadside stop race data uniformly throughout state law enforcement agencies, with the goal of obtaining uniform roadside stop race data for analysis agency shall collect roadside stop data consisting of the following:

(A) the age, gender, and race of the driver;

(B) the reason for the stop;



(C) the type of search conducted, if any;

(D) the evidence located, if any; and

(E) the outcome of the stop, including whether:

(i) a written warning was issued;

(ii) a citation for a civil violation was issued;

(iii) a citation or arrest for a misdemeanor or a felony occurred;

or

(iv) no subsequent action was taken.

(2) Law enforcement agencies shall work with the Criminal Justice Training Council with the goals of collecting uniform data, adopting uniform storage methods and periods, and ensuring that data can be analyzed. Roadside stop data, as well as reports and analysis of roadside stop data, shall be public.

Sec. 4. 13 V.S.A. chapter 182, subchapter 3 of is added to read:

Subchapter 3. Law Enforcement Practices

§ 5581. ELECTRONIC RECORDING OF A CUSTODIAL

INTERROGATION

(a) As used in this section:

(1) "Custodial interrogation" means any interrogation:

(A) involving questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject; and

(B) in which a reasonable person in the subject's position would consider himself or herself to be in custody, starting from the moment a person should have been advised of his or her Miranda rights and ending when the questioning has concluded.

(2) "Electronic recording" or "electronically recorded" means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation, or if law enforcement does not have the current capacity to create a visual recording, an audio recording of the interrogation.

(3) "Place of detention" means a building or a police station that is a place of operation for the State police, a municipal police department, county sheriff department, or other law enforcement agency that is owned or operated by a law enforcement agency at which persons are or may be questioned in connection with criminal offenses or detained temporarily in connection with criminal charges pending a potential arrest or citation.

(4) "Statement" means an oral, written, sign language, or nonverbal communication.

(b)(1) A custodial interrogation that occurs in a place of detention concerning the investigation of a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title shall be electronically recorded in its entirety.

(2) In consideration of best practices, law enforcement shall strive to record simultaneously both the interrogator and the person being interrogated.

(c)(1) The following are exceptions to the recording requirement in subsection (b) of this section:

(A) exigent circumstances;

(B) a person's refusal to be electronically recorded;

(C) interrogations conducted by other jurisdictions;

(D) a reasonable belief that the person being interrogated did not commit a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title and, therefore, an electronic recording of the interrogation was not required;

(E) the safety of a person or protection of his or her identity; and

(F) equipment malfunction.

(2) If law enforcement does not make an electronic recording of a custodial interrogation as required by this section, the prosecution shall prove by a preponderance of the evidence that one of the exceptions identified in subdivision (1) of this subsection applies. If the prosecution does not meet the burden of proof, the evidence is still admissible, but the Court shall provide cautionary instructions to the jury regarding the failure to record the interrogation.

#### **Sec. 5. LAW ENFORCEMENT ADVISORY BOARD**

(a) The Law Enforcement Advisory Board (LEAB) shall develop a plan for the implementation of Sec. 1 of this act, 13 V.S.A. § 5581 (electronic recording of a custodial interrogation).

(b) The LEAB, in consultation with practitioners and experts in recording interrogations, including the Innocence Project, shall:

(1) assess the scope and location of the current inventory of recording equipment in Vermont;

(2) develop recommendations, including funding options, regarding how to equip adequately law enforcement with the recording devices necessary to

carry out Sec. 1 of this act, 13 V.S.A. § 5581 (electronic recording of a custodial interrogation); and

(3) develop recommendations for expansion of recordings to questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject regarding any felony offense.

(c) On or before October 1, 2014, the LEAB shall submit a written report to the Senate and House Committees on Judiciary with its recommendations for the implementation of Sec. 1 of this act, 13 V.S.A. § 5581 (electronic recording of a custodial interrogation).

**Sec. 6. EFFECTIVE DATES**

This act shall take effect on passage except for Sec. 4 which shall take effect on October 1, 2015.